PP

v.

LEE JUN HO & ORS

HIGH COURT MALAYA, KUALA LUMPUR
APANDI ALI J
[CRIMINAL TRIAL NO: 45-46-2003]
30 DECEMBER 2008

CRIMINAL LAW: *Penal Code - Sections 302 and 34 - Murder and common intention - Admissibility of statements tendered under s. 32(1) Evidence Act 1950 - Circumstantial evidence - Whether prima facie case made out - Acquittal and discharge without calling for defence*

EVIDENCE: *Statement - Statement of person who could not be called as witness - Admissibility - Requirements and prerequisites - Evidence Act 1950, s. 32(1)*

EVIDENCE: *Hearsay - Exception - Statement of person who could not be called as witness - Admissibility - Requirements and prerequisites - Evidence Act 1950, s. 32(1)*

EVIDENCE: *Witness - Statement of - Statement of person who could not be called as witness - Admissibility - Requirements and prerequisites - Evidence Act 1950, s. 32(1)*

CRIMINAL PROCEDURE: *Prosecution - Prima facie case - Murder and common intention - Circumstantial evidence - Acquittal and discharge without calling for defence*

EVIDENCE: *Circumstantial evidence - Securing conviction on - Murder and common intention - Prima facie case - Acquittal and discharge without calling for defence*

WORDS & PHRASES: *"who cannot be found" - Evidence Act 1950, s. 32(1) - Meaning of*

The three accused persons, together with two other persons still at large, were jointly charged with the murder of one Dr Ariaratnam Thuraiayah at his clinic on 21 April 2003, an offence punishable under s. 302 read with s. 34 of the Penal Code ('Code'). In the course of the trial, the prosecution attempted to

A tender two statements ('ID.66 and ID.67') recorded from two witnesses – both of them workers at the clinic who were present during the incident – as evidence under the provisions of s. 32(1) of the Evidence Act 1950 ('EA'). Both witnesses were Indian nationals who subsequently could not be traced. The three
B accused persons objected to the application on the grounds that there had been a failure to comply with the prerequisites of s. 32 of the EA.

Held (acquitting and discharging the three accused persons
C **without calling for their defence):**

(1) Section 32 of the EA is an exception to the general rule that hearsay evidence is inadmissible and under subs. (1), one of the circumstances under which such a statement becomes
D admissible is where the person who made the statement "cannot be found". For a witness to be clothed as "who cannot be found" within the meaning of s. 32(1) of the EA, such determination is a finding of fact, of which the onus is upon the prosecution to prove. From the facts adduced in this
E case, the police had failed to take all reasonably practicable steps to trace the witnesses. In fact, there was not a single proactive effort by the police to procure the attendance of such material, relevant and important eyewitnesses. There was no attempt to fully utilise the prevailing and available
F provisions of the Criminal Procedure Code *ie*, ss. 47, 49, 118(1) and 396, in order to secure the attendance of the witnesses. In view of that and guided by the established cases, it was found that the prosecution had failed to meet the requirements and the prerequisites of s. 32(1) of the EA.
G Accordingly, the statements ID66 and ID67 were inadmissible as evidence for the prosecution. (paras 13, 14, 15, 16, 17 & 18)

(2) With the ruling against the admissibility of ID66 and ID67, there was no direct evidence adduced to prove the charge
H against the three accused. The prosecution relied on solely circumstantial evidence, and elected to use s. 34 of the Code to prove common intention. There was, on the facts and circumstances of the case, insufficient evidence to infer that there existed common intention within the meaning of s. 34
I

of the Code. It was most unfortunate for the prosecution that the two important witnesses, who were present at the clinic at the material time, could not be called to shed better light on the prosecution's case. This misfortune was further compounded by the police's failure to take all reasonably practicable steps to trace them in their effort to ensure their attendance in court, which could have qualified their statements to be admitted as evidence under s. 32(1) of the EA. Thus, at the end of the prosecution's case there were various doubts left and it was unsafe to convict the accused persons. A *prima facie* case had not been made out against the three accused persons and they were, hence, acquitted and discharged. (paras 19, 26, 28, 29 & 30)

Case(s) referred to:
Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chan Chun Ling & Anor v. PP [1955] 1 LNS 8 HC ***(refd)***
Chang Kim Siong v. PP [1968] 1 MLJ 36 ***(refd)***
Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54 SC ***(refd)***
Dato' Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***
Ibrahim v. PP [1962] 1 LNS 56 HC ***(refd)***
Mahbub Shah v. Emperor AIR [1945] PC 118 ***(refd)***
Muhamad Safarudin Baba & Anor v. PP [2002] 4 CLJ 210 CA ***(refd)***
Ng Ah Kiat v. PP [1987] 2 MLJ 336 ***(refd)***
PP v. Chow Kam Meng [2001] 7 CLJ 387 HC ***(refd)***
PP v. Gan Kwong [1997] 2 CLJ Supp 433 HC ***(refd)***
PP v. Mogan Ayavoo [2004] 3 CLJ 623 HC ***(refd)***
PP v. Mohamad Said [1984] 1 MLJ 50 ***(refd)***
PP v. Mohd Jamil Yahya & Anor [1994] 1 CLJ 200 HC ***(refd)***
PP v. Murugan Subramaniam & Ors [1996] 3 CLJ 921 HC ***(refd)***
PP v. Norfaizal Mat (No 2) [2008] 8 CLJ 576 HC ***(refd)***
Tan Cheng Kooi & Anor v. PP [1972] 1 LNS 146 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 47, 49, 112, 118(1), 180(2), 396
Evidence Act 1950, ss. 32(1), 114(g)
Penal Code, ss. 34, 35, 302

For the 1st accused - Gooi Soon Seng; M/s Gooi & Azura
For the 2nd accused - KY Leong; M/s S Sothi, Leong & Partners
For the 3rd accused - Naran Singh; M/s Naran Singh & Co
For the prosecution - Afzainizam Abdul Aziz DPP; Attorney General's Chambers

Reported by Suresh Nathan

JUDGMENT

Apandi Ali J:

Introduction

[1] The three accused persons were jointly tried for murder. The charge against them reads as follows:

> **Pertuduhan**
>
> Bahawa kamu bersama-sama dua lagi yang masih bebas, pada 21 April 2003, antara pukul 3.30 dan 4.00 pagi, di Pusat Perubatan Arinaga, No. 86, Lorong Maarof, Bangsar Park, dalam daerah Brickfields, Wilayah Persekutuan Kuala Lumpur, dalam meneruskan niat bersama kamu semua telah melakukan kesalahan bunuh dengan menyebabkan kematian Dr. Ariaratnam a/l Thuraiayah dan oleh yang demikian itu kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dibaca bersama seksyen 34 Kanun yang sama.

[2] At the end of the prosecution's case, I found that the prosecution had failed to make out a *prima facie* case against all the three accused, and hence they were acquitted and discharged, without calling for their defence.

Brief Facts Of The Case

[3] In the early morning of 21 April 2003, at about after 2am, PW9, Ping Thiam Huat, a restaurant worker, went upstairs of the first floor of the premises of HSBC Restaurant, which is his dwelling, to sleep. A short while later, PW9 heard a loud scream coming from the direction of Klinik Arinaga, which is located next door to HSBC Restaurant. The clinic is on the ground floor.

[4] Looking through a window, PW9 saw a man covered in blood running out of the clinic. The man is a worker of Klinik Arinaga. PW9 saw two Chinese males chasing the man. One of the Chinese males was armed with a knife. The man fell down, and the armed Chinese man struck him. PW9 spontaneously shouted "polis!" to scare them off. He then saw a Malay male standing infront of the Clinic.

[5] A motor car with another Chinese male at the wheels, was seen outside of the Clinic. Upon hearing the shout by PW9, another male Chinese came out from the Clinic. There were all

together five males: four Chinese and one Malay. They all got into the motorcar bearing registration No. WJT 936, and left the scene.

[6] PW9 then went to the Clinic and saw blood on the floor at the entrance. Fear took over him and he dare not venture further. He then went straight to the Pondok Polis Bangsar, to report what he saw. He walked to the Pondok Polis Bangsar. Upon arrival at the Pondok Polis, he was told by the police that they have been informed of the robbery at the Clinic by a phone call. PW9 was not the one who made the call.

[7] Soon later, at about 5.30am, the police arrived at the scene. The Forensic unit came at about 6.30am. Next day, in the early morning of 22 April 2003, the police managed to trace the motorcar WJT 936, said to be seen at the crime scene, as described by PW9. The motor car was recovered from the house of Norhaizan, PW10. The motor car was then taken to the Police Contingent Kuala Lumpur for examination. Upon examination, traces of human blood were found in various places in the car.

[8] Further investigations led to the arrest of the three accused persons, in the following manner: OKT1, Lee Jun Ho surrendered himself to the police on 27 April 2003; OKT2, Choy Chin Chuan was arrested on 4 May 2003; and OKT3, Nor Adzlan surrendered himself to the police, on 5 May 2003. The other two males, who were also seen at the crime scene, were still at large.

Ruling On Statements Of Witnesses Who Cannot Be Called

[9] In the course of the trial, the prosecution attempted to tender two statements recorded from two witnesses, namely Vasudevan s/o Perumal Chelladurai and Vellaichamy Sockkalingam. For purposes of identifications the statements were marked as ID66 and, ID67 respectively. The prosecution's application to tender the witnesses' statements as evidence was made under the provisions of s. 32(1) of the Evidence Act 1950; ie, on the basis that the witnesses cannot be found.

[10] Learned counsels for all the accused objected to the application on the grounds that there has been a failure to comply with the prerequisites of s. 32 of the Evidence Act 1950.

[11] After hearing all the evidence in the prosecution's case, and upon hearing submissions by all parties, but before making a decision at the end of the prosecution's case, the court made a ruling on this matter.

[12] Before that, I made the following findings:

(i) Both witnesses are Indian nationals and both came to Malaysia, using Indian Passports.

(ii) Both of them are workers at Klinik Arinaga and were present during the robbery incident on 21 April 2003.

(iii) The first witness, Vasudevan s/o Perumal Chelladurai was the one who was injured in the robbery and his statement (ID66) was recorded by police while he was still in hospital on 9 June 2003. The investigating officer visited the witness, much earlier on 5 May 2003.

(iv) The second witness, Vellaichamy Sockkalingam, was also a worker of Klinik Arinaga, and his statement (ID67) was recorded by police on 8 May 2003, on subsequently a further statement was recorded on 10 October 2003.

(v) Both witnesses are eye-witnesses as to what transpired during the robbery at the clinic.

(vi) The Investigating Officer, PW20, DSP Rosly b. Hassn only made efforts to trace these eye-witnesses after receiving a letter from the AG's chambers dated 5 November 2007 for purposes of continued hearing of this trial, which was then scheduled on 12-14 March 2008. Prior to that there was no action taken to trace these witnesses, despite the fact that this case commenced with trial, before another judge, way back on 18 April 2006.

(vii) The Investigating Officer seeks the assistance of the Interpol Section at Bukit Aman on 16 January 2008 and then only on 5 February 2008 the relevant information were faxed to their counterpart in New Delhi, India.

(viii) The Investigating Officer later seeks the assistance of the Immigration Department, through a letter, sent on 4 July 2008.

(ix) It is clear that, the importance of the two witnesses must have been realized after the s. 112 statements were recorded from them, sometime in the middle of year 2003. Actions to trace these foreigners were only taken in year 2008, while in the midst of the trial. Such action, taken five years after recording their statements, is obviously taken at the eleventh hour. It is most unreasonable, in the circumstances, particularly so in a case under s. 302 of the Penal Code. Surely, it is legitimate for the court to expect greater efforts to be made to secure the attendance of such relevant witnesses in such a serious charge. The gravity of the case demands greater efforts.

[13] Section 32 of the Evidence Act 1950 is an exception to the general rule that hearsay evidence is inadmissible. Under s. 32(1) of the Act, one of the circumstances under which such a statement becomes admissible is where the person who made the statement "cannot be found". This was the basis upon which the prosecution tried to invoke when they attempted to produce and tender ID66 and ID67 For a witness to be clothed as "who cannot be found" within the meaning of s. 32(1) of the Evidence Act 1950, such determination is a finding of fact, of which the onus is upon the prosecution to prove.

[14] From facts adduced, I find that the police has failed to take all reasonably practicable steps to trace the witnesses. In fact there was not a single proactive effort by the police to procure the attendance of such material, relevant and important eye-witnesses.

[15] There was no attempt to fully utilize the prevailing and available provisions of the Criminal Procedure Code, in order to secure the attendance of the witnesses. The police failed to invoke the provisions of s. 47 and 49 of the Criminal Procedure Code; which empowers the court to issue a warrant *in lieu* of or in addition to summon a witness and to require that person to execute a bond for his appearance in court. The police also failed to invoke the provisions of s. 118(1) of the Criminal Procedure Code whereby the police officer who desires any person, who is acquainted with the circumstances of a case, to be present in court, shall require that person to execute a bond to appear at the trial court. The prosecution also failed to utilize the provisions

of s. 396 of Criminal Procedure Code whereby the Public Prosecutor may apply to court for any witness of any seizeable offence that intends to leave Malaysia and that witness's presence at the trial to give evidence is fatal for the trial, to be committed to the civil prison until trial or until he shall give satisfactory security that he will give evidence at the trial.

[16] I recalled, as a Deputy Public Prosecutor for the states of Kelantan/Trengganu in the late 1970s, at the height of the Vietnam War, when there was an influx of refugees from Vietnam into Malaysia, there were many serious seizable offences committed by the refugees. Important witnesses for such offences also involved Vietnamese refugees. On my advise, the police then, did not hesitate to seek recourse to the provisions of s. 396 of the Criminal Procedure Code, in order to ensure the attendance of such witnesses at the Criminal trials. The law is the same today. These legal provisions are available, to be utilized in such circumstances as in this case.

[17] In view of the above circumstances especially of the omissions by the police to take all reasonably practicable steps in tracing the witnesses, and guided by the following cases (on s. 32(1) Evidence Act):

PP v. Mohamad Said [1984] 1 MLJ 50;

PP v. Mohd Jamil bin Yahya & Anor [1994] 1 CLJ 200;

PP v. Gan Kwong [1997] 2 CLJ Supp 433;

PP v. Chow Kam Meng [2001] 7 CLJ 387.

PP v. Mogan Ayavoo [2004] 3 CLJ 623; and

PP v. Norfaizal Mat (No. 2) [2008] 8 CLJ 576.

[18] I hold that the prosecution has failed to meet the requirements and the prerequisites of s. 32(1) of the Evidence Act 1950. I accordingly ruled that the statements, ID66 and ID67 are inadmissible, as evidence for the prosecution.

The Prosecution's Case

[19] With the ruling against the admissibility of ID66 and ID67, there was no direct evidence adduced to prove the charge against the three accused. The prosecution relied solely on circumstantial evidence. As earlier narrated by PW9, Ping Thiam Huat, five male persons were seen near the vicinity of the Klinik Arinaga. The three accused were charged with two other persons who are still at large. From evidence adduced, the two still at large are Wai San and Oliver.

[20] The case that was unfolded before the court is very sketchy. The three accused were charged with committing murder, jointly with the two still at large and the prosecution invoked s. 34 of the Penal Code as the common intention element. One of the issues before the court is therefore, is there a common intention to commit the offence of murder? Is the hatching of a pre-arranged plan credible and clear to indicate such common intention?

[21] The only witness that was called to prove the element of common intention was PW17, Chin Yew Eng. In his evidence, PW17 told of a conversation to rob the clinic of drugs; this can be seen at p. 185 of the notes of evidence. PW17 also stated that OKT1 then took out three parangs, similar to exh. P22B that was recovered at the clinic.

[22] Under cross-examination, PW17 stated that during the alleged conversation of the plan to rob, three other persons named Aeron, Alex and Game were present (see p. 191 of the notes of evidence).

[23] It is noted that the said three persons who were present during the alleged conversation of the plan were not called to give evidence or even make available for the defence. In view of suggestions made about the alleged conversation during the cross-examination of PW17, the calling or making available of the said three witnesses is essential in the circumstances. Failure to do, would inevitably trigger the adverse presumption under s. 114(g) of the Evidence Act 1950.

[24] PW17 also told the court that after the incident at the clinic, OKT1 told him that "they hurt the doctor and the staff" and narrated further that "Oliver started slashing the doctor and Wai San slashed the staff: (see p. 188 of the notes of evidence). Are these actions by the two still at large, Oliver and Wai San, can be accepted as actions in furtherance of a common intention, to commit murder? It is not clear.

[25] On the weapon used, although it was said that three parangs were shown, only one parang (exh. P22B) was recovered. There were not finger prints on P22B. As narrated by PW17, the three parangs were shown at the hotel. One parang was seen, by PW9, to be in the hands of the assailant who chased the clinic worker outside the clinic and one parang was recovered inside the clinic. Is the parang (exh. P22B) the actual murder weapon?. Who handled the parangs at the time of the robbery, at the clinic remained unclear. There is no evidence to show or indicate if any of the three accused were armed with the parangs at the time they went to the clinic.

[26] The prosecution in this case elected to use s. 34 of the Penal Code, in order to prove common intention. Section 34 speaks of "... in furtherance of common intention". Case law that explained of such requirement of a pre-arranged plan or a meeting of the minds to commit the common criminal act can be seen in:

Mahbub Shah v. Emperor AIR [1945] PC 118;

Chan Chun Ling & Anor v. PP [1955] 1 LNS 8 HC;

Tan Cheng Kooi & Anor v. PP [1972] 1 LNS 146 HC;

Choo Chang Teik & Anor v. PP [1991] 3 CLJ 2387; [1991] 1 CLJ (Rep) 54;

PP v. Murugan Subramaniam & Ors [1996] 3 CLJ 921;

Dato' Mokhtar bin Hashim & Anor v. PP [1983] 2 MLJ 232;

Ng Ah Kiat v. PP [1987] 2 MLJ 336, and

Muhamad Safarudin Baba & Anor v. PP [2002] 4 CLJ 210.

From facts adduced and the circumstances of the case, I find that there is insufficient evidence to infer that there existed common intention within the meaning of s. 34 of the Penal Code. It would probably be a different ball game, if s. 35 of the Penal Code was invoked by the prosecution. Section 35 speaks of knowledge or intention and need not necessarily be common intention, when the act is done by several persons.

Conclusion

[27] At the end of the prosecution's case, the learned Deputy Public Prosecutor conceded that he is relying on circumstantial evidence to prove his case. To prove a criminal case based on circumstantial evidence is admittedly an uphill task for any Deputy Public Prosecutor. In this case, such circumstantial evidence, taken as a whole, must give rise to an irresistible conclusion that the three accused persons committed the offence of murder (see case of *Chang Kim Siong v. PP* [1968] 1 MLJ 36.

[28] I sympathized with the learned Deputy Public Prosecutor for having the difficult task to prove common intention and the acts in furtherance of such common intention, without the benefit of direct evidence of eye-witnesses. It is most unfortunate for the learned Deputy Public Prosecutor that the two important witnesses, Vasudavan and Vellaichamy, who were present at the clinic at the material time, could not be called to throw better light onto the prosecution's case. This misfortune is further compounded by the police's failure to take all reasonably practicable steps to trace them in their efforts to ensure their attendance in court, that could have qualified their statements to be admitted as evidence under s. 32(1) of the Evidence Act. In the circumstances, at the end of the prosecution's case the court is left with various doubts, as indicated above.

[29] Furthermore, it is not safe to convict the accused persons, when such evidence is not clear and credible, in the event the accused persons elect to remain silent (see the case of *Balachandran v. PP* [2005] 1 CLJ 85. And, I must add, it is not for the defence to fill up the gaps or to clear the doubts in the prosecution's case (see the case of *Ibrahim v. PP* [1962] 1 LNS 56.

[30] In conclusion, I find that, at the end of the prosecution's case, the prosecution has not made out a *prima facie* case against all the three accused persons; and in accordance with the provisions of s. 180(2) of the Criminal Procedure Code, all the three accused persons are acquitted and discharged.